FILED
SEP 27 1984
L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO.

PHILIP D. ALDOUS

Petitioner

vs.

CATHERINE B. ALDOUS

Respondent

PETITION FOR A WRIT OF CERTIORARI
COURT OF APPEALS
OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. May the religious beliefs and activities of a parent be constitutionally considered in a custody case, absent any evidences that such beliefs pose imminent or substantial harm to the children or others?

2. Does the use of religious beliefs as a factor in child custody adjudication invalidate the proceedings and require a new trial?

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Petitioner, Philip D. Aldous respectfully prays that a writ of certiorari issue to review the order of the New York Court of Appeals entered on June 29, 1984 refusing to review the Opinion for Affirmance of the New York Supreme Court Appellate Division.

OPINIONS BELOW

The Order of the New York Court of Appeals, not reported, appears in the Appendix hereto at 16A. The opinion of the Supreme Court of the State of New York - Third Appellate Division is reported at 743 N.Y.S. 2d 60 (A.D. 3 Dept., 1984) and appears in the Appendix hereto at 12A. The opinion of the Family Court of Otsego County appears in the Appendix at 1A.

JURISDICTION

The order of the Court of Appeals for the State of New York was entered on June 29, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United

States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Philip and Cathy Aldous were married in September, 1971. They had two children, Kimberly (born in 1973) and Jennifer (born in 1976).

Marital difficulties arose, and a divorce followed. Their divorce was entered in May, 1981 without adjudication of the issue of permanent custody of the parties' two little girls. The subsequent trial in this case solely concerned the issue of custody and any support which should accompany same.

The trial record included the usual character testimony

and psychological data often provided in family law litigation as an evidentiary basis for custody adjudication, including evidence of Mrs. Aldous's suicidal tendencies and history of substance abuse.

When the parties were married in 1971, Mrs. Aldous was an Episcopalian and Mr. Aldous was a Methodist. Neither was particularly active in any church in the early years of the marriage. Around 1977, the father began attending church regularly at Greater Glen Falls Bible Baptist Church, the church attended by his parents. The mother would attend this church also, but not as frequently as the father. However, she was active within the church, even to the extent that with her husband she was a leader of a church team group, and participated as a family in other church activities.

During the trial, the mother sought to inject the husband's religious beliefs and activities into the custodial litigation. No evidence was presented by her, however, to indicate that the religious beliefs or activities of Mr. Aldous in any way involved illegalities [see Prince v. Massachusetts, 321 U.S. 158 (1944)], or constituted any threat of imminent or substantial harm to the children.

The Family Court in its decision focused upon the devout convictions and religious worship of Mr. Aldous in

determining what was "best" for the children, awarding their permanent custody to the mother.

As noted in the trial court's Findings (supra at 8A):

> "At the time of the marriage of the parties, he was a Methodist, and she was an Episcopalian. They were married in the Episcopal Church. Neither went to church regularly when they first got married. Around 1973 Mr. Aldous joined the Born Againt Christian Baptist Fundamentalist Religion. He went all out. He went to that church several times a week and twice on Sunday. He insisted that the children attend the church and wanted Mrs. Aldous to attend the church which she did on occasion. His involvement with the church seem to dominate his life. This was one of the reasons for the separation and divorce."

Subsequently in its decision, the trial court focused again on this matter.:

> "The lifestyle that he has chosen revolving himself around this church is not what the children want or need at this stage. If he were to be awarded custody, their entire lifestyle would have to change to suit him and his new beliefs. Whether this could be accomplished is conjectural. There would be no advantage to the children if custody were changed from the father to the mother; indeed, the Court finds that it would be to their disadvantage.
>
> The Court has taken into account all relevant considerations and makes its determination on what it thinks is in the best interests of the children. The Court finds that it would be in the best interests of the children to leave custody with the mother who the Court finds to be a fit parent rather to give custody to the father who the Court finds is more interested in forcing the children to conform to his beliefs than in what is best for the children." (supra at 10A).

Mr. Aldous appealed, asserting that the Findings, Decision, and Order made by the trial court in this case constitute state action which is repugnant to, and violative of, both the Free Exercise Clause and the Establishment Clause of the First Amendment to the Constitution of the United States.

The Appellate Division of the New York Supreme Court agreed that "it would appear that Family Court's view that Defendant's religious beliefs are too discipline oriented is constitutionally prescribed as a basis for awarding custody", and that "the Court's consideration of religion may be impermissable in this case." (infra at 15A). However, the Appellate Division concluded that the trial court's analysis of other factors "negates any implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion by the Court." (ibid.)

Mr. Aldous then appealed to the New York Court of Appeals maintaining inter ali, that the trial court's consideration of his religious beliefs and practices in this case were in violation of the Free Exercise and Establishment clauses of the First Amendment of the United States Constitution. On June 29, 1984, the New York Court of Appeals dismissed the appeal "upon the grounds that no

substantial constitutional question is directly involved." Mr. Aldous now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING WRIT

1. THIS CASE PRESENTS AN ISSUE OF GROWING IMPORTANCE CONCERNING THE USE OF RELIGION IN THE ADJUDICATION OF CHILD CUSTODY DISPUTES.

Increasingly, the Court dockets of the nation have become swollen with litigation involving the sensitive issue of the custody of children of divorcing parents.[1]

This Court has on numerous occasions dealt with the fundamental interests of parents to guide their children's moral and religious developments. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Meyer v. Nebraska, 262 U.S. 390, 401-402, (1923); Pierce v. Society of Sisters, 268 U.S. 510, 535, (1925).

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[1] One out of every three marriages now end in divorce, and a majority of these divorces involve children. [Committee on the Family of the Group for the Advancement of Psychiatry, NEW TRENDS IN CHILD CUSTODY DETERMINATIONS (NY: Law & Business, Inc.,/Harcourt Brace Jovanovich, 1980)]. According to the Census Bureau, between 1956 and 1976, the number of children involved in divorce proceedings rose from 361,000 to 1,100,00. U. S. Department of Commerce, Bureau of Census, DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT, 1 (1979).

However, while this Court has thus erected a constitutional shield to protect the joint spousal exercise of parental decision-making in the moral and spiritual formation of children, it has not addressed the constitutional principles applicable when the spouses enter the judicial forum to and disagree over custody issues, including the religious training or teaching to be afforded the children.

Particularly in view of the fact that this Court has not given plenary consideration to this issue, there are compelling reasons for definitive guidelines in the application of the First and Fourteenth Amendments to state court child custody proceedings.

A.) Establishment Clause

In this case, detailed adversarial inquiry into the religious beliefs of the Petitioner herein was made at trial regarding the Petitioner and his Pastor. (e.g., see infra at 17A, et.seq.) The appended example only emphasizes that state utilization of religion as part of the "best interest of the child" standard requires governmental analysis and evaluations of religious belief which enmesh the judiciary in doctrinal judgments.

Using religion as a facet of judicial decision-making in custody cases based upon consideration and evaluation

of conflicting parental religious beliefs and activities is precisely the sort of judicial inquisition which the Establishment Clause prohibits. It is not only the result in the nature of a judicial decree which is constitutionally defective, it is the very process leading toward such a decree when the process incorporates a searching inquiry into doctrines of a particular parent. As noted by this Court in the past, "it is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." NLRB vs. Catholic Bishop of Chicago, 440 U.S. 490, 502.

Because the judiciary cannot know the effect of religious teaching, only evidence of "actual impairment of physical, emotional and mental well-being contrary to the best intest of the child" should be entertained. Quiner vs. Quiner, 59 Cal. Reptr. 503 (1967).

As recognized by one court:

> "Precisely because a court cannot know one way or another, with any degree of certainty, the proper or sure road to personal security and

> happiness or to religious salvation, which latter to untold millons is their primary and ultimate best interest, evaluation of religious teaching and training and its projected as distinguished from immediate effect (psychologists and psychiatrists to the contrary notwithstanding) upon the physical, mental and emotional well-being of a child, must be forcibly kept from judicial determinations. . . If a court has the right to weigh the religious beliefs or lack of them of one parent against those of the other, for the purpose of making the precise conclusion as to which one is for the best interests of a child, we open a Pandora's box which can never be closed. By their very nature religious evaluations are subject to question, disbelief, and difference of opinion." Id. at 516-517.

B. Free Exercise Clause

It is settled in First Amendment litigation that "only those interests of the highest order and those not otherwise served can overbalance claims to the free exercise of religion." Wisconsin vs. Yoder, 406 U.S. 205, 215.

Judicial evaluation of parental religious convictions and worship, where those beliefs and activities do not jeopardize the physical health or safety of the children, infringes upon the Free Exercise rights of both parent and child. The constitutional infirmity of such a burden on the Free Exercise Clause has been described by one commentator as follows:

> "Where the nuclear family has already been fragmented, the courts are often confused regarding the extent to which they are constitutionally obligated to respect parental rights. Nowhere is this confusion more apparent than in the . . . type of case where religious beliefs are relied upon as part of the 'best interest' equation in resolving custody disputes. The tendency of some courts in custody cases to disregard the clearly established rights of the parents to control the religious training of their children has been characterized as a 'flagrant abuse of the Courts' power, and a clear infringement of parents' rights'. An examination of the cases where religious factors have been considered in custody disputes suggests that the constitutional rights of parents to control the religious training of their children is not extinquished upon divorce." [Mangrum, Exclusive Reliance On Best Interest May Be Unconstitutional: Religion As A Factor In Child Custody Cases, 15 CREIGHTON LAW REVIEW, 25 at 52, 55 (1981)][2]

Petitioner's religious beliefs and practices so permeated the trial court's consideration of the custody issue as to require the complete invalidation of the proceedings and the results therefrom. The very process by which the custody of his children was denied to him violates the First Amendment to the United States Constitution. The refusal of the New York appellate courts to order a new proceeding

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[2] The subject has also been discussed in Note, The Religious Upbringing Of Children After Divorce, 56 NOTRE DAME LAWYER, 160 (1980); and Comment, 81 DICK, L.REV. 733 (1977).

despite the admitted error of the trial court cannot be justified. The correct view was enunciated in Jackson vs. Jackson, Kan., 309 P.2d 705 (1957):

> ". . . the findings of the Court are so inconsistent with the rule [regarding the role of religion in custody cases] that the record cannot be allowed to stand as it is. In this custody case, the record affirmatively shows religion was in it from beginning to end. The court may have had other good and sufficient reasons for changing custody, but they cannot be distinguished from those of religion. We must hold from the record that the court abused its discretion and that its order changing custody must be set aside."

Petitioner contends that religious factors may be considered in custody cases only where (1) the child's actual religious needs require it, (2) the religious beliefs or activities of parent and child illegally threaten other parties, or (3) the religious beliefs or activities of a parent threaten eminent and substantial harm to the child. (See Mangrum, supra at 82.) The issue has widespread applicability and merits granting of the writ requested.

II. THE STATE COURTS DIFFER MARKEDLY IN THE APPLICABILITY OF THE FIRST AND FOURTEENTH AMENDMENTS TO CHILD CUSTODY PROCEEDINGS.

While the parental right of custody and control of minor children has long been recognized by this Court

to be within the ambit of First and Fourteenth Amendment protection, the application of those protections in child custody proceedings currently meets with widely divergent views in the courts of the nation. Child custody litigation is centered chiefly in state court forums, and the states differ markedly in the manner in which the First and Fourteenth Amendments to the United States Constitution are construed to apply to the consideration of religion in such disputes.

The more widely accepted view holds that religious beliefs afford no grounds for depriving a parent of custody. 2 CHILD CUSTODY & VISITATION LAW AND PRACTICE § 10.06 [3].

For example, the courts of Illinois, Maine, Kansas, Alaska, Massachusetts, New Hampshire, Maryland, Missouri and Washington have severely restricted the manner in which a parent's religion can be judicially evaluated and utilized as a factor in divorce proceedings involving the custody or visitation rights of parents.[3]

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3 Gottlieb vs. Gottlieb, 175 N.E. 2d 619 (Ill. 1961); Osier vs. 410 A2d 1027 (Me, 1980); Jackson vs. Jackson, 309 P2d 705 (Kan., 1957); and Denton vs. James, 107 Kan. 729, 12 ALR 1146; Bonjure vs. Bonjure, 592 P2d 1233 (Al., 1979); Felton vs. Felton, 418 NE 2d 606 (Mass., 1981); Sanborn vs. Sanborn, 465 A 2d 888 (N.H., 1983); Levitsky vs. Levitsky, 231 Md. 388, 190 A2d 621 (Md., 1963); Waites vs. Waites, 567 S.W. 2d 326 (Mo., 1978); Munoz vs. Munoz, 79 Wash.2d at 813, 789 P2d at 1135 (Wash., 1971).

However, other states by appellate pronouncement or by statute allow religion to be utilized as a factor in child custody or visitation adjudications.[4]

> "In custody and training cases the constitutional rights of the respective parents are not diluted as a consequence of nuclear family breakdown. Rather, for the first time, the rights of each parent have to be taken into account along with the rights of the child and the interests of the state. The reconciliation of these rights and interests is a complex legal problem, which has not always been coherently addressed by the Courts. A conceptual understanding of the factual circumstances in which religious factors may be constitutionally relied upon in deciding custody and control issues is required.
>
> A close reading of custody cases suggests that with few exceptions religious beliefs and practices are constitutionally protected and may not be relied upon in awarding custody despite the intuitive impression that the 'best interest' standard requires that the state insure that the child has as 'normal' a childhood experience as possible." (Mangrum, supra at 55.)

Granting certiorari in this case would permit this Court to address and resolve the conflicting state views of First Amendment standards in state court custody proceedings.

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[4] e.g., see Burnham vs. Burnham, 208 Neb. 498, 304 N.W. 2d 58 (1981); In re: Marriage of Moorhead, 224 N.W. 2d 242 (Iowa, 1974); Morris v. Morris, 412 A2d 139 (Pa., 1979); HAWAII REV. STAT., § 571 46(5); MICH. COMP. LAWS ANN. § 722.23(3); MINN. STAT. ANN., § 518.17; WIS. STAT. ANN., § 767.24.

CONCLUSION

For these reasons, a writ of certiorari should be issued.

RESPECTFULLY SUBMITTED,

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APPENDIX

FAMILY COURT COUNTY OF OTSEGO

In the Matter of the Supreme Court
Referral Docket No. R498-80

CATHERINE B. ALDOUS, Plaintiff

-against

PHILIP D. ALDOUS, Defendant

FINDINGS, DECISION AND ORDER

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BACKGROUND

During the pendency of a divorce action between these parties, the defendant made application to this court in the fall of 1980 to be granted reasonable visitation with his children over the Christmas season. Both parties were represented by attorneys, and they became to an agreement which was reduced to writing on December 18, 1980. By an order of this court dated December 22, 1980, the court directed that the parties comply with the terms of their agreement.

Again, in June of 1981, the defendant applied to this court to establish visitation with his children during the summer months. Testimony was taken, and in July, 1981, this court made an order allowing the defendant to have his children with him for a period of three weeks.

In May of 1981 the parties were divorced. Temporary custody was continued with the plaintiff, and the matter of permanent custody and visitation was referred to the Family Court. The earliest possible date that could be given for the taking of proof was September 30, 1981. Extensive testimony was taken on that date, and the hearing was closed

except that the plaintiff was to be examined and evaluated as shown by the court's memorandum of September 30, 1981. The parties and the lawyers consented that the court order appropriate investigations. The court made a temporary order regarding support. Further, the court directed that the previous agreement of the parties regarding visitation would remain in effect subject to the court reviewing the same if problems arose until the matter of permanent custody was determined.

Again, the defendant filed a petition in December, 1981 seeking a court order regarding reasonable Christmas vistitation. The matter was set down for December 18, 1981 unless the parties have come to a prior agreement. The parties did come to an agreement, and the court made an order now therewith on December, 18, 1981. At that time the court had not received the evaluation of the plaintiff.

Much correspondence took place between the attorneys with copies being sent to the court as to why the evaluation agreed to had not been completed. Apparently, the dispute was about the qualifications of the psychologist. Because there was not any agreement and the court had not received any evaluation, no decision was made.

In July of 1982, the court received the psychological evaluation of the plaintiff, which apparently, was made by someone that was acceptible to the defendant and his attorney.

Again, an application was made in the summer of 1982 by the defendant seeking visitation at this home for three continuous weeks. The matter was set down for a hearing. The parties and their attorneys appeared, and an agreement was reached resulting in the order of August 20, 1982.

By a letter of October 12, 1982 addressed to the court, a copy of which went to plaintiff's attorney, the defendant requested that the court interview the children. No response was ever received from the plaintiff or her attorney.

Again, in October 1982, the defendant petitioned the court to have the court fix visitation during the Thanksgiving and Christmas holidays that were coming up. An agreement was reached resulting in an order of this court dated November 23, 1982.

It has been the practice of this court not to interview children unless the parties and their attorneys consent that such interview be conducted in private and in chambers and that the interview not be disclosed to the parties or

their attorneys but that a memorandum of the interview be kept by the court to be available for review purposes. In this case no agreement was made. In addition, because of the ages of the children, the court does not feel that an interview is necessary.

The investigation and reports that were ordered have been received by the court. These reports are deemed confidential but shall be made available in the event of any appellate review (see Kessler v. Kessler, 10 NY 2d 445; Aberbach v. Aberbach, 33 NY 592; Matter of Lincoln v. Lincoln, 24 NY 2d 270).

In September of this year, the plaintiff remarried and has moved from her previous residence in Richfield Springs to her present residence with her new husband and children. Because of this, the court requested that the Otsego County Probation Department make an additional investigation and file an updated report with the court. This updated report was received on December 16, 1982.

GENERAL LAW PROPOSITIONS REGARDING CUSTODY

Parents are joint custodians and guardians of their children, and neither parent has a prima facia right to custody. There is no presumption in favor of awarding custody of young children to their mother. The best interests of the child in the Court's primary concern, and that concern is best satisfied by a studied, thoughtful review of the hearing record by the trial court that leads to a determination based on sound discretion which, in turn, rests on a substantial evidentiary basis.

Custody of children should be established on a long-term basis whenever possible. Children should not be shuttled back and forth between divorced parents merely because of changes in matrimonial status, economical circumstance, or improvements in moral or psychological adjustment, at least so long as the custodial parent has not been shown to be unfit or perhaps less fit to continue as a proper custodian. The rearing of a child requires greater stability than a roller-coaster treatment of custody. Changes in establishment custody should be made only on a demonstration

of a sufficient change in circumstances to show a real need to effect a change to insure the welfare of the child. While a child's view should be consulted to ascertain his or her attitude and to lead to real facts, it should not be determinative. If it were, then all a court would be required to decide is whether his or her preference of a parent is voluntary and untainted and then follow the child's wish. Certainly, this would not be conducive to the proper raising of children.

Priority, not as an absolute, but as a weighty factor, should, in the absence of extraordinary circumstances be according to the first custody awarded in litigation or by voluntary agreement. Stated another way, it is a general rule that absent extraordinary circumstances, great weight must be accorded to the prior custody arrangement as determined by voluntary agreement of the parties.

The separation of siblings is to be frowned upon. Close familial relationships are much to be encouraged. By building identity, countering feelings of isolation, and encouraging healthy adjustments to and with others, they provide an important additional dimension to long-term stability. A

family unit is struck a vital blow when parents divorce; it is struck an additional one when children are separated from each other.

(See the following: Corradino v. Corradino, 64 AD 2d 320; In the Matter of Kathleen Heller v. Jacob Bartman, Jr., 65 AD 2d 876; Nierenberg v. Nierenberg, 43 AD 2d 717, aff'd 36 NY 2d 850; Matter of Nehra v. Uhlar, 43 NY 2d 242; Peo. Ex. Rel. Selbert v. Selbert, 60 AD 2d 692, Matter of Ebert v. Ebert, 38 NY 2d 700; Peo. Ex. Rel. Wasserberger v. Wasserberger, 34 NY 2d 660; Peo. Ex. Rel. William "BBB" v. Katherine "CCC", 44 AD 2d 817; Matter of Rudolfo "CC" v. Susan "CC", #& AD 2d 657; Obey v. Degling, 37 NY 2d 768; In the Matter of Barkley v. Barkley, 68 AD 2d 954; Dintruff v. McGreevy, 34 NY 2d 887; Peo. Ex. Rel. Wasserberger v. Wasserberger, 42 AD 2d 93; Matter of Scoville v. Scoville, 47 AD 2d 971; Opferbock v. Opferbock,, 57 AD 2d 1074; Matter of Lamb v. Lamb, 69 AD 2d 961).

Extraordinary circumstances are not a sine qua non of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, without contest, and without merging the agreement in the judgment. The only absolute

in the law governing custody of children is that there are not absolutes. Nehra's phrase "absence of extraordinary circumstances" is to be read as "absence of countervailing circumstances on consideration of the totality of circumstances," not that some particular, sudden or unusual event has occurred since the prior award. The standard ultimately to be applied remains the best interests of the child when all of the appliable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary (Friederwitzer v. Friederwitzer, 55 NY 2d 89).

While concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development. In determining whether the custodial parent can continue to provide for the child's various needs, the court must be cognizant of the individual needs of each child (Eschbach v. Eschbach, 56 NY 2d 167).

FINDINGS

The parties were married to each other in September 1971. They separated in June of 1979. Kimberly was born on August 11, 1973, and Jennifer was born on January 22, 1976. The children have been in the custody of their mother since the separation some 3 1/2 years ago.

At the time of the marriage of the parties, he was a Methodist, and she was an Episcopalian. They were married in the Episcopal Church. Neither went to church regularly when they first got married. Around 1973 Mr. Aldous joined the Born Again Christian Baptist Fundamentalist Religion. He went all out. He went to that church several times a week and twice on Sunday. He insisted that the children attend the church and wanted Mrs. Aldous to attend the church which she did on occasions. His involvement with the church seemed to dominate his life. This was one of the reasons for the separation and divorce.

Mr. Aldous seems to be a very domineering person. Nobody seems to be able to satisfy him, and he has had several lawyers during his matrimonial lawsuit. The medical people that were suggested by Mrs. Aldous' attorney to examine

her did not seem to satisfy him. One person who appears to be able to control him is his mother who lives next door to him.

After the parties had separated, while the children were visiting with him, he had them baptized in his new religion without consulting the mother. This upset the mother, as well as the Episcopal Priest in Richfield Springs whose church was attended by the mother and the children regularly. According to the girls, their father and grandmother downgraded their mother whenever they visited with their father.

The lifestyled of Mr. Aldous seems to have remained the same since the separation and divorce. Mrs. Aldous went to secretarial school and sought and obtained employment to make a life for herself and her children. This she was doing in a good fashion. Now she has remarried. The person she has married is Bradley Burke, Jr., who is 33 years old. He is a high school graduate and completed 2 years at State University at Morrisville. He is in partnership with his father in managing the family farm. It is Mr. Burke's second marriage. He had 2 children by his first marriage whose ages are 8 and 6 (a boy and a girl). These children live with their mother approximately 2 miles from where Mr. Burke resides with his present wife. They visit with

him every other weekend and on holidays and vacations. Apparently, he is able to communicate with is former wife.

The home in which the Burkes now live is adequately suitable for them and for all 4 children. Mrs. Burke is no longer employed outside the home. Jennifer and Kimberly attend Mount Markham School near West Winfield. The Burke children and the Aldous children get along well together, and Mrs. Burke is available to supervise their activities in conjunction with her husband. Their residence is across the road from the farm, and Mr. Burke is home every night and also eats lunch at home.

Both doctors who examined Mrs. Burke found her to possess the intellectual and emotional qualities prerequisite to effective and wholesome functioning as a custodial parent.

This record is replete with numerous applications to the Family Court for relief because of the parents' inability to agree on matters concerning the children. Joint custody would be inappropriate. If custody were awarded to the father, he would continue to downgrade their mother in the eyes of the children. The lifestyle that he has chosen revolving himself around his church is not what the children want or need at this stage. If he were to be awarded custody, their entire lifestyle would have to change to suit him and his new beliefs. Whether this could be accomplished is

conjectual. There would be no advantage to the children if custody were changed from the mother to the father; indeed the court finds it would be to their disadvantage.

The court has taken into account all relevant considerations and makes its determination on what it thinks is in the best interests of the children. The court finds that it would be in the best interests of the children to leave custody with the mother who the court finds to be a fit parent rather to give custody to the father who the court finds is more interested in forcing the children to conform to his beliefs than in what is best for the children.

CONCLUSION

Custody of the children is awarded to the mother with whom they have resided since their birth with visitation being granted to the father. If the parents cannot arrive at a mutually agreeable visitation schedule, either is free to petition the court in that regard.

These are the Court's Findings and its Decision and Order.

Dated: December 17, 1982.

Family Court Judge

#46193

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

CATHERINE B. ALDOUS
Respondent,

against

PHILIP D. ALDOUS
Appellant.

Argued, January 3, 1984.

Before: HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. T. PAUL KANE,
HON. JOHN T. CASEY,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

APPEAL from an order of the Family Court of Otsego County (Joseph A. Mogavero, Jr., J.), entered December 17, 1982, which awarded permanent custody of the parties' children to Plaintiff.

AMSHOFF & AMSHOFF (Ellen Leary Coccoma of counsel, 45 Pioneer Street, P. O. Box 88, Cooperstown, New York 13326), for appellant, 1445 Starks Building, 455 Fourth Avenue, Louisville, Kentucky 40202.

CHARLES E. CRANDALL, JR., for respondent, 410 North Main Street, Herkimer, New York 13350.

OPINION FOR AFFIRMANCE

KANE, J.

Plaintiff and defendant were married in September, 1971 and divorced in May, 1981. There are two issue of the marriage, Kimberly, age 10, and Jennifer, age eight. The decree of divorce referred all matters of custody and support for the children to the Family Court of Otsego County for a hearing on a permanent award. Temporary custody remained in plaintiff with whom the children had been living since the parties' separation in December, 1980. Plaintiff resided in the Village of Richfield Springs, Otsego County, and defendant in the Village of Hudson Falls, Washington County, the site of the matrimonial domicile prior to the separation.

A hearing on the issue of permanent custody was held on September 29, 1981. At the conclusion of the hearing on that date, Family Court made an interim order continuing temporary custody in plaintiff, with visitation rights to defendant, and directed that he pay $35 per week for the support of his children. It further ordered plaintiff to undergo an examination by a qualified psychologist, at the expense of defendant, to determine her suitablity as a custodial parent. In addition, Family Court directed the probation departments to conduct an investigation of each party concerning matters pertinent to the issue of custody and

file a written report to the court, which, with the consent of each party, would be for its eyes only. After some delay in obtaining the required information, Family Court awarded permanent custody to plaintiff, with reasonable visitation rights to defendant. This appeal by defendant ensued.

The central issue on this appeal arises from the wording of the decision of Family Court. Defendant is a member of the Greater Glen Falls Bible Church and plaintiff is an Episcopalian. In its decision, the court stated:

> "The lifestyle that [defendant] has chosen revolving himself around his church is not what the children want or need at this stage. If he were to be awarded custody, their entire lifestyle would have to change to suit him and his new beliefs.
>
> * * * * *
>
> The court finds that it would be in the best interests of the child to leave custody with [plaintiff] * * * rather than to give custody to [defendant] who * * * is more interested in forcing the children to conform to his beliefs than in what is best for the children."

The transcript of the hearing on September 29, 1981 clearly demonstrates that one of the precipitating causes of the deterioration and ultimate dissolution of the marriage herein is the differences in the respective religious beliefs of these parties and, in particular, the requirements necessary to fulfill the principles and practices of the church to which defendant is affiliated.

However, it is defendant's contention that, in making

the award of custody to plaintiff, Family Court conducted an inquiry into the religious doctrines and activities of a possible custodial parent, and then based its determination of custody upon its evaluation of those particular religious activities in deciding what would be in the best interests of the children. Thus, it is alleged, Family Court so entangled matters of church and state as to violate the establishment clause and free exercise clause of the First Amendment to the Constitution of the United States (Lemon v. Kurtzman, 403 US 602).

In any custody dispute, the court's primary concern is tht the final determination of a custodial parent is in the best interest of the child (Domestic Relations Law, § 240; Friederwitzer v. Friederwitzer, 55 NY 2d 89). Many factors enter into that determination, and there are no absolutes. When presented as an issue, religion may be considered as one of the factors in determining the best interest of a child, although it alone may not be the determinative factor (see Matter of Kanaanack, 272 App Div 783). In this State, cases which consider religion as a factor in resolving custody disputes generally fall into three separate categories. New York courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs

can be served better by one parent than the other (see Spring v. Glawon, 89 AD 2d 980); when a religious belief violates a State statute (see Matter of Weberman, 198 Misc. 1055, aff'd 278 App Div 656, aff'd 302 NY 85, app dsmd 342 US 884); and when a religious belief poses a threat to a child's well-being (see Spring v. Glawon, supra; Matter of Battaglia v. Battaglia, 9 Misc 2d 1067).

Applying these rules to the instant proceeding, it would appear that Family Court's view that defendant's religious beliefs are too discipline oriented is constitutionally proscribed as a basis for awarding custody. However, other grounds enumerated by the court certainly support its determination. The children have been with plaintiff since birth, including the time from the divorce to the final custody decision. Additionally, there was evidence of the degradation of plaintiff by defendant and his parents when the children were with him, and, of singular importance, evidence of plaintff's stable family life which permits her to care for the children all day on a daily basis. Such factors have been held to be appropriate considerations when awarding custody (LaBow v. LaBow, 59 NY 2d 956; Corradino v. Corradino, 48 NY 2d 894; Meirowitz v. Meirowitz, 96 AD 2d 1030; Martin v. Martin, 74 AD 2d 419; see, also, Entwistle v. Entwistle, 61 AD 2d 380, app dsmd 44 NY 2d 851; Matter of Saunders

v. Saunders, 60 AD 2d 701). Moreover, psychological interviews and testing did not show either parent to be unfit, and there is no basis for any claim that plaintiff has not cared for her children in a proper manner.

In sum, there is an abundance of evidence in this record to support the determination of custody as made, and although the court's consideration of religion may be impermissible in this case, its analysis of the other factors, fully supported in the record, negates any implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion by the court (see, e.g., Martin v. Martin, supra; Opferbeck v. Opferbeck, 57 AD 2d 1074, mot for lv to app den 42 NY 2d 810).

The order should be affirmed, with costs.

3 Mo. No. 511

Catherine B. Aldous,
Respondent

vs.

Philip D. Aldous,
Appellant.

Decision Court of Appeals
June 29, 1984

Motion to dismiss the appeal granted and the appeal dismissed, with costs nd twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

PARTIAL TRIAL TRANSCRIPT
OF CROSS EXAMINATION OF
PASTOR, GUY GOODELL

CROSS EXAMINATION BY PLAINTIFF'S ATTY. CHARLES CRANDALL:

Q. Pastor, do you prefer to be addressed as Pastor rather than Reverend?

A. I would prefer it; it's up to you.

Q. Pastor, I gather from the early part of your testimony that you have been involved in the Faith Baptist Evangelical ministry since your teens, is that correct?

A. Yes sir.

Q. And, you indicate that you are the pastor for the Greater Glen Bible Baptist Church in Glens Falls, right?

A. Hmm-hmm.

Q. Is that church associated with any particular hierarchy in the Baptist theology?

A. Yes, Sir, we are associated with the Baptist Bible Fellowship International and listed in their directory in the State of New York.

Q. Do they impose any rules upon you as far as what you have to do?

A. No, Sir.

Q. They don't impose any procedural rules or anything like that?

A. No, Sir.

Q. You're own unit is really a unit in and to itself. You are the President of the Board of Directors?

A. No, Sir, we're incorporated under New York State Law.

Q. I understand that, but, you don't get any direction, theologically, down the pipe from anybody?

A. No, Sir.

Q. You run your own show, Sir?

A. I think that would be disrespectful to call it running your own show.

Q. I didn't mean to be disrespectful. Do you run the unit?

A. Yes, Sir.

Q. Pastor, in addition to . . . Or, could I ask you, how long the morning services are on Sunday - - - is that a couple of hours long?

A. It depends on which one you're talking about. Sunday school is forty-five minutes, and because it's graded for different programs based on the psychological attention span of the child. For the morning services we also have children's services so the children who would be unsuitable in the longer session would have something that would fit into their attention span. It's geared to the needs of the people.

Q. Would these children be there for the later part of the morning on Sunday morning?

A. From about 10:00 until 12:00, Yes, Sir.

Q. This was in 1978, '79?

A. Yes, and the pattern still follows . . . the same time pattern still follows.

Q. When the children are approximately three and five years old?

A. At that time, yes, Sir.

Q. And, then there's evening services, Pastor?

A. Yes, Sir.

Q. And, the children would attend that with their mother or father or whatever?

A. Yes, Sir, in that case they would come into the main service in the evening.

Q. They would also go in the evening?

A. Hmm-hmm.

Q. How long would that last?

A. We don't have a definite time; sometimes we show a film, sometimes we have other activities, but we can say an average of an hour to an hour-and-a-half.

Q. And, then again there are services or a meeting on Wednesday?

A. Yes, Sir.

Q. And, that would be attended by the children?

A. Well, up until recently . . . that particular time - - - '78/'79 - - - we felt the children needed to have their own program at least most of the time because of the attention span, so we had a children's program on Wednesday night, which the older children were quite excited about.

Q. Do you have any activities on Thursday?

A. We have volunteer soul winning where some of the members who want to share their faith in Christ come in for training.

Q. What do you do?

A. We go out and have people visit the church . . . have cards made up and pass the cards to interested parties, and people go to homes and share their faith in Jesus Christ and encourage thos people to receive Jesus Christ. I encourage them not to use duress because . . .

Q. Do they take a letter with them and pass the letter out to them?

A. Sometimes, yes.

Q. Having to do with your particular Evangelical movement?

A. We're not Evangelical; we're Fundamentalist.

Q. Would you explain that to me?

A. We believe the bible is the word of God, basically.

Q. Would I be correct to say, literally is the word of God?

A. I believe, plainly is the word of god.

Q. And, that certain excesses or failures or difficulties of the flesh are really not to be . . . are very bad, let's put it that way?

A. What do you mean; could you be more specific?

Q. Let me ask you this: There are more people in society who imbile in alcoholic beverages.

A. Hmm-hmm.

Q. Do you rule as far as that's concerned?

A. We don't allow any of our church members that we know of - - we can't follow everybody around - - we don't have any of our church members we know partaking in drinking alcoholic beverages; they agree by covenant not to do that.

Q. How about participating in parties and that sort of thing?

A. Once again, it depends on what kind of parties. We have regular parties and entertainment for our members in which we do not have alcoholic beverages and which we regulate and control the kind of activities going on. But, in the sense of unrestrained, uncontrolled license, we don't permit that.

Q. How about card playing.

A. We don't encourage card playing.

Q. How about going to the movie theatre?

A. We don't encourage that, but we substitute something for that by having films in church.

Q. And, how about attendance at municipal facitilies, such as the swimming pool during the summer time; do your children and people do that?

A. Well, I cant' speak for everybody in my church. I discourage that because of the immodesty standard, yes, Sir. My children do not attend.

Q. When you say, immodesty standard, do I understand you to mean the dress of the people at the pool; the bathing suits they're wearing are very improper?

A. Yes, Sir, I think so, yes.

Q. This is all part of your fundamentalist theory and feeling based on your reading of the Bible?

A. That's what the Bible teaches us, yes, Sir.

Q. Are there any other activities I haven't mentioned you could think of that, unfortunately for your views, a goodly number of people participate in in society and your position is your parishioners should not do so?

A. We encourage them not to participate in the use of hard drugs. We discourage their being disrespectful to civil authorities. Is that what you had in mind?

Q. Do you see a lot of things in your community you really disapprove of?

A. Well, those two things.

Q. How about, Pastor, eating habits - - - that type of thing. Do you encourage drinking any particular type of liquids?

A. No, Sir.

Q. Do you drink regular water right out of the tap?

A. Yes, Sir.

Q. How about foods . . . any particular foods?

A. My problem is I'm open to just about all of it.

Q. I assume along with your views toward the use of alcohol

. . . is that the same with respect to cigarette smoking and pipe smoking?

A. The Federal Administration lists those as drugs.

Q. Please, Pastor, just . . .

A. Yes, I'm opposed to those drugs, yes, Sir.

84-728

Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-728

IN THE
SUPREME COURT OF THE UNITED STATES

1984 Term

PHILIP D. ALDOUS
Petitioner,

v.

CATHERINE B. ALDOUS
Repondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Edward J. Rose
48 North Ann Street
Little Falls, New York 13365
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Attorney for Respondent

QUESTIONS PRESENTED

I. Does the consideration in a custody proceeding of the religiously-based activities of a parent as one factor among many in the evaluation of the best interests of a child violate the religious clauses of the First Amendment as applied through the Fourteenth Amendment?

II. Does the consideration of such religiously-based activities in a custody proceeding constitute a *per se* violation which requires reversal?

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ARGUMENT

Contrary to the contentions of the Petitioner, this case does not involve a situation in which a court has made a child custody determination because of an unfavorable opinion of a parent's religious beliefs. As this brief will indicate, the decision of the lower court to award custody to the Respondent was based on many different factors. One such factor was the effect the Petitioner's religiously-based lifestyle would have on the children's lives.

The consideration of the effect of religiously-based activities, as distinct from beliefs, on a child's welfare in a custody proceeding is a narrow, but proper, topic of inquiry. While the objective validity of the religious beliefs or their temporal merits is not a valid basis for a court's consideration in any context, e.g., Thomas v. Review Board of Indiana Employment Security

Division, 450 U.S. 707 (1981) (resolution of question of what is or is not a religious belief does not turn on judicial perception of particular belief or practice in question); Gillette v. United States, 401 U.S. 437 (1971) (validity of putative conscientious objector's beliefs not a proper subject for judicial scrutiny), the effect of those beliefs when put into action may be properly addressed by the courts. Thus, in Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944), it was stated that the authority of the state to act as parens patriae is "not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." The delineation between belief and action in a religious context is perhaps most vividly illustrated by those cases in which parents attempt to deny

medical treatment to their critically ill children, such as when Jehovah's Witnesses object to transfusions of blood. See, e.g., Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); Jehovah's Witnesses of the State of Washington v. King's County Hospital, Inc., 278 F. Supp. 488 (W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968). The legitimacy of the religious beliefs was scrupulously avoided in those cases, but the effect of the activity on the welfare of the children involved was considered without hesitancy and the parents' religiously-based conduct was curtailed by the courts.

The issue in this case is not the validity or propriety of religious beliefs, but whether the effect of those beliefs on the

welfare of the children may be considered as one factor in a custody determination. This issue is not of recent origin; courts have been considering the question since at least In re Doyle, 16 Mo. App. 159 (1884), where it was held that a court in a child custody proceeding cannot pass on the comparative merits of various religions. Since that time, courts have generally held that, while religion may not be the sole factor for resolving a custody dispute, "the religious factors involved in an award are a proper matter to be considered by the court in determining what decision is best for the general welfare of the child . . . ." Annot., "Religion As Factor In Child Custody and Visitation Cases," 22 A.L.R.4th 971, 976 (1983). The general rule which has emerged is that where a prospective parental custodian's "religious

convictions might result in physical or mental harm," or where the child is of "an age to have developed a substantial interest in and feeling for a particular religion," the courts will take such into consideration. Id. at 976, 987. This is substantially the same rule applied by the lower court in this case. Aldous v. Aldous, 99 A.D.2d 197, 473 N.Y.S.2d 60, 62 (1984) (court may consider religious factors where child developed actual ties to specific religion, where belief poses threat to child's well-being or violates law). The per se rule apparently advocated by the Petitioner, however, would have such considerations for a child's welfare nullifed on the basis of a putative claim of religious liberty.

I. THERE IS NO DISPUTE AMONG THE STATES WHICH REQUIRES RESOLUTION.

The Petitioner's assertion that the states "differ markedly" in the manner in

which religious factors may be considered in custody proceedings is without merit. It is true that religious beliefs alone afford no grounds for the denial of custody, and no court has so held. See generally Annot., supra, 22 A.L.R.4th 971 (1983). Nor has any court ruled that religious activities may never be considered when evaluating the best interests of the child. Rather, in cases which have had a religious factor injected into the proceedings, the question has been how and whether the activities will affect the general welfare of the child; where custody has been denied on that basis, it has been because the practices "were found to seriously threaten the health or physical well-being of the child, or lead such parent to neglect it . . ." Id. at 997. Furthermore, in none of the cases cited by the

Petitioner were religions "judicially evaluated;" rather, the religiously-based activities were considered for their impact on the welfare of the child. This sort of judicial scrutiny of activity has been approved in other contexts by this Court. See United States v. O'Brien, 391 U.S. 367 (1968) (activity component of otherwise protected first amendment activity (speech) may be regulated).

The allegation that the state courts are "widely divergent" is without support; in fact, the cases relied on by the Petitioner for this proposition prove the opposite. In Osier v. Osier, 410 A.2d 1027 (Me. 1980), cited as a case in which inquiry into a parent's religious activities is "severely restricted," the court held that the standard of the best interests of the child was

controlling, and that dangers posed to the child as a result of certain religious practices can be considered in a custody dispute. The trial court was reversed in that case not because it had considered religious activities in making its decision, but rather because there was insufficient evidence of danger to the child to support the trial judge's conclusion. Similarly, in Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957), the court did not reject the use of religion as a factor in child custody cases, but found impermissible the use of religion qua religion as the primary factor of the custody decision. This approach is consonant with the general rule that religion may not constitute the only or primary reason in support of a custody decree. This theme was echoed by Felton v. Felton, 383 Mass. 232,

418 N.E.2d 606 (1981), and Sanborn v. Sanborn, 465 A.2d 888 (N.H. 1983), both of which involved visitation rights rather than custody disputes. Even in this context, both courts stressed that the best interests of the child prevailed, and that the court should be able to address the issue of the parties' religion as they relate to the "concerns and temporal welfare" of the children. 465 A.2d at 893. The balance of the cases relied on by the Petitioner reach similar conclusions, and all are in accord with the decision reached in this case. Religious activities as a factor may be inquired into for the impact they may have on the child's welfare, but may not constitute the sole basis for a decision.

The cases cited by the Petitioner as opposing and divergent to this standard are,

upon scrutiny, actually supportive. Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981), for example, held that the child's best interest governed and that religion may be one, but not the only, factor in a custody determination. In re Marriage of Moorehead, 224 N.W.2d 242 (Iowa 1974) held similarly. The consonance of the case law among the several states is aptly demonstrated by Morris v. Morris, 271 Pa. Super. 19, 412 A.2d 139 (1979). Morris reached the familiar conclusion that religious activities may be considered, and quoted approvingly at length from Munoz v. Munoz, 79 Wash. 2d 810, 489 P.2d 1133 (1971). It is significant that the Petitioner cited Morris and Munoz as "markedly" different from each other, despite the fact that they both reached similar conclusions. There is therefore no

divergence among the states regarding the propriety of considering religious activities as they may affect the best interests of the child in a custody dispute.

II. NO CONSTITUTIONAL PROVISION IS VIOLATED ON THESE FACTS.

A) The Consideration Of Religiously-Oriented Activities Does Not Constitute An Establishment of Religion

When legislation or official conduct is challenged as violative of the Establishment Clause, it is well established that the activity should be "scrutinized . . . to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984) (citing Walz v. Tax Commission, 397 U.S. 664, 669 (1970)). In this regard, no rigid or mechanical rules of analysis can

properly be delineated; the clause is not a "statute," but an "objective," erecting a "'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" 104 S. Ct. at 1362 (quoting Walz v. Tax Commission, supra, 397 U.S. at 668, and Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). Inquiry into whether the challenged activity has a secular purpose, whether its principal effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion has nevertheless proven to be "often useful." 104 S. Ct. at 1362. See also Lemon v. Kurtzman, supra (test used to invalidate direct state aid to parochial schools because, inter alia, statutory scheme required excessive entanglement and likely to foster political divisiveness).

The line or barrier between the government and the erection of "any national ecclesiastical establishment" is in no way breached in this case. Lynch v. Donnelly, supra, 104 S. Ct. at 1361 (quoting 3 Story, Commentaries on the Constitution of the United States 728 (1833)). In a child custody matter, the purpose behind any consideration of religious-based activities of a parent is secular in nature. The focus is on the best interests of the particular children given their particular circumstances, not on the favoring of any particular religious belief over others. Further, no aid, direct or indirect, is accorded any church or religion as a consequence of a custody determination. No church or religion is hindered in its activities. Finally, there is no evidence of an excessive entanglement of govern-

ment with religion on these facts.

In the context of determining custody of children of divorce, some inquiry regarding the religious activities of parents and children when gathering evidence concerning their overall activities may in fact be inevitable. As this Court itself has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). It has been recognized that religious and other activities will at times overlap, and therefore "a hermetic separation of the two is an impossibility [the Establishment Clause] has never required." Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 746 (1976).

The Petitioner's claim that mere consideration of religious actitivies in the context of evaluating the best interests of a

child in a custody proceeding constitutes a violation of the Establishment Clause is without merit; it cannot fairly be said that, in reality, such considerations work to establish a religion or religious faith. Cf. Lynch v. Donnelly, supra. No real issue of establishment is raised by these facts. The narrow focus taken on this one aspect of the custody proceeding has resulted in an analytical error by the Petitioner: To "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." Lynch v. Donnelly, supra, 104 S. Ct. at 1362. This is the result reached by the Petitioner. In actuality, this case does not present any genuine religious issue or objective which requires the sanction or protection of the Establishment Clause.

B) The Consideration Of Religiously-Oriented Activities Does Not Burden The Free Exercise Of Religion

The Petitioner's right to the free exercise of his religion is not drawn into question through the award of custody of the children to the Respondent. The Free Exercise Clause acts as a "prohibition against governmental regulation of religious beliefs, [and] protection for lawful conduct grounded in religious belief . . ." Bob Jones University v. United States, 103 S. Ct. 2017, 2034-35 (1983) (citing Thomas v. Review Board of Indiana Employment Security Division, supra; Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)). Sincerely held religious beliefs or practices therefore may not be directly or indirectly

burdened by government action, unless the challenged action serves a compelling interest that cannot be achieved in a less restrictive manner. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. at 718; L. Tribe, American Constitutional Law § 14-10 (1978). The burden of proof in free exercise cases is on the plaintiff to demonstrate a burden on religious practice, School District of Abington v. Schemp, 374 U.S. 203, 223 (1963), and inasmuch as the Petitioner has not met that requirement, there is no violation of the clause.

The Free Exercise Clause is violated where "substantial pressure [is placed] on an adherent to modify his behavior and to violate his beliefs . . . ." Thomas v. Review Board of Indiana Employment Security

Division, supra, 450 U.S. at 718 (1981). On these facts, there is no violation because neither the right to custody nor visitation was conditioned upon the Petitioner altering his beliefs. Nor is the Petitioner required to compel affirmation of a repugnant belief, as in Torasco v. Watkins, 367 U.S. 488 (1961) (oath of office), nor is a penalty exacted against him because his religious views are "abhorrent" to the authorities, as in Fowler v. Rhode Island, 345 U.S. 67 (1953). He is freely able to engage in his religious activities of choice, and his absolute right of belief remains unaffected. The Petitioner has therefore not alleged a cognizable burden.

Even assuming arguendo that some burden is placed on the right of free exercise, it has not been demonstrated to be substantial;

a custody decision in which liberal visitation rights are provided for is considerably less onerous for free exercise purposes than the forced participation of Amish children in secular schooling attempted by the state in Wisconsin v. Yoder, supra. Even in that context, Chief Justice Burger cautioned that "the very concept of ordered liberty precludes allowing every person to make his own standards" regarding the conduct of themselves or their children. 406 U.S. at 215-26. Parental rights to freely practice religion are therefore not affected by state actions taken to protect and preserve the health and welfare of their children, even when the actions taken are contrary to the religious beliefs of the parents. It is not the beliefs which are at issue, but the actions taken pursuant to those beliefs which

may be acted upon by the state. See, e.g., Prince v. Massachusetts, supra (child labor prohibitions upheld against claim of free exercise for child's religious pamphleteering); Application of President & Directors of Georgetown College, Inc., supra (medical treatment); Harley v. Oliver, 404 F. Supp. 450 (W.D. Ark. 1975), aff'd, 539 F.2d 1143 (8th Cir. 1976) (same); Jehovah's Witnesses of the State of Washington v. King's County Hospital, Inc., supra (same). In this case, no religious conduct is being prohibited or limited. The Free Exercise Clause is not involved on these facts.

III. THE MATTER WAS PROPERLY RESOLVED BY THE COURT BELOW.

The Petitioner has alleged that his religious beliefs were used against him in the determination of custody following his

divorce from the Respondent. Scrutiny of the trial record, the judge's findings, and the appellate decision reveals, however, that insofar as the issue of religion was involved, it was considered only to the extent of the activities and the resultant effect on the children. The findings of the trial judge reveal that the custody determination was based on many factors in addition to that of religion, including the fitness of the Respondent, the Respondent's stable family life, the fact that the children and the Respondent have never been separated, and the downgrading of the Respondent by the Petitioner in front of the children. All these factors, when taken together with the lifestyle and religious activities of the Petitioner, formed the basis for the custody determination.

It is well established that the final determination by a trial court of a child custody dispute should not be disturbed on appeal, absent an abuse of discretion or manifest error. Martin v. Martin, 74 A.D.2d 419, 427 N.Y.S.2d 419 (1980); Arcarese v. Monachino, 58 A.D.2d 1030, 397 N.Y.S.2d 284 (1977); Opferbeck v. Opferbeck, 57 A.D.2d 1074, 395 N.Y.S.2d 831 (1977). The reason for this rule is the recognition that the trial court, having viewed all the evidence regarding the best interests of the children, is in the best position to weigh the importance of any particular factor regarding custody. In this case, the appellate court on review recognized that the trial court used a multiplicity of factors in making its custody determination. The appellate court stated that if the trial court rested its

decision on the "view that [Petitioner's] religious beliefs are too discipline oriented, [it would be] constitutionally proscribed as a basis for awarding custody." Aldous v. Aldous, supra, 473 N.Y.S.2d at 62. In view of the totality of the evidence, however, it is clear that the consideration of religious activities was not abused. Id. at 63. With regard to the religious activities issue, the appellate court affirmatively found that even if it were assumed that it was improper, the record "negate[d] any implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion . . . ." Id.

Insofar as the Petitioner's religious beliefs did not constitute the basis of the award, and in light of the evidence that to the extent that the conduct which would

result from those beliefs was considered did not taint the final determination, the issue was properly resolved by the court below and the custody award was made on no constitutionally proscribed basis.

CONCLUSION

For the foregoing reasons, the application for a writ of certiorari in this case should be denied.

Respectfully submitted,

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